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DECISION OF THE COMPTROLLER GENERAL OF THE UNITED STATES

B-124146 (UNPUBLISHED) July 7, 1955

A person serving this Agency as a contract agent, the nature of whose services clearly indicate that he is an independent contractor, rather than an employee, does not hold an office or position within the meaning of the dual compensation statutes.

COMPTROLLER GENERAL WARREN TO THE DIRECTOR OF CENTRAL INTELLIGENCE

Reference is made to your letter of May 21, 1955, requesting our decision upon the question whether retired commissioned officers of the armed services lawfully may be employed by your Agency under the circumstances related in your letter and receive remuneration incident to such employment without violating section 2 of the act of July 31, 1894, as amended, 5 U.S.C. 62, and section 212 of the act of June 30, 1932, as amended, 5 U.S.C. 59a. The 1894 act prohibits the holding of two offices if the compensation of either amounts to the sum of $2,500 per annum while section 212 of the 1932 act precludes the concurrent receipt by a retired officer of civilian compensation and retired pay on account of commissioned service at a combined annual rate in excess of $3,000.

It is stated in your letter than certain types of services required in the fulfillment of your unique functions cannot be economically and satisfactorily performed by regular employees of your Agency and that, therefore, you have entered into contracts with certain individuals for the furnishing of confidential information and services which contracts normally provide for payment of a fee at a stated amount per year of service. In that connection you state that your Agency's requirements may be precise and for a single occasion or they may be broad contemplating an extended period and that there normally is no accurate method of putting a dollar value on the information or services to be obtained, although in certain cases a negotiated figure is reached. In most cases, however, it is stated that the fairest method of computing the fee involved is upon an annual basis and that such fee is regarded as being the equivalent of a retainer fee paid an attorney in private practice which frequently is paid upon an annual basis.

In connection with the character of employment, the following facts appear. Your agency exercises no control or supervision over the performance of the work of the contractor; it provides no office space,

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facilities, tools, or appliances; there are no prescribed hours of work; and the individual in his discretion carries out the work at such times and under such circumstances as he deems expedient. In connection with the prosecution of the work he may utilize the services of other persons as he sees fit and such persons are not subject to the supervision of your Agency. In short, the individual is told what information your Agency desires and is left to his own resources and devices to obtain that information.

Since all of the related facts pertaining to the employment in question, with the exception perhaps of the method of payment, strongly indicate that the relationship of the individual to the Government is that of an independent contractor rather than an employee we are of the view that such employment does not constitute the holding of a second office in violation of the 1894 statute.

While it has been held that retired officers employed by the Government and paid on a time basis are subject to the double compensation restrictions contained in section 212 of the Economy Act (see 28 Comp. Gen. 381), we do not feel that the rule enunciated in that decision and applied in similar cases is for application in the instant case. The time actually to be worked by an individual under a contract such as here involved does not actually constitute the basis for payment although his fee covers a period of actual or potential service of one year. In that connection, no time records are kept and no hours of duty are prescribed. Rather, the time worked is left entirely to the discretion of the individual. The very nature of the job--the procurement of confidential information--for which the individual is hired realistically is inconsistent with the concept of employment upon the basis of time actually worked. We, therefore, concur in your view that the yearly payment reasonably may be regarded as a payment of a fee for such services as the individual may be called upon to render during the year and is in the nature of an attorney's general retainer fee which does not have reference to any particular service but takes in the whole range of possible future contention which may render attorneyship necessary or desirable. Agnew v. Walden, et al., 4 So. 672, 673. Accordingly, we conclude that section 212 of the act of June 30, 1932, has no application to employment under the circumstances related in your letter.